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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. .....

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

JACK EDWARD GALARDI and
ANGEL JERROLD GALARDI,

Petitioners/Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a petition of JACK EDWARD GALARDI and ANGEL JERROLD GALARDI for a Writ of Certiorari to review the Orders made by the United States Court of Appeals for the Ninth Circuit on April 4, 1973, denying petitioners' appeal, and on May 17, 1973, denying petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc, which appeal was sought to review the Order made by the United States District Court, Central District

of California, on July 6, 1972, convicting petitioners of violations of Title 18, U.S.C., §§ 2, 371, 641, 2115, and 2314.

OPINIONS BELOW

To petitioners' knowledge, there are no official or unofficial reports of (a) the Order Denying Petitioners' Motion to Dismiss for a Lack of Speedy Trial or the Order Allowing the Government to Introduce a Hearsay Document Into Evidence; (b) the Order entered on April 4, 1973 affirming petitioners' convictions on all counts except Count Seven, the violation of Title 18, U.S.C., § 2314 (a copy of said Order has been attached hereto as Appendix "A"); or (c) the Order filed by the United States Court of Appeals for the Ninth Circuit on May 17, 1973, denying petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc (a copy of said Order has been attached hereto as Appendix "B").

JURISDICTION

1. Petitioners filed a Motion to Dismiss the Indictment for Lack of Due Process and Speedy Prosecution in the United States District Court, Central District of California, challenging the delay of three and one-half years after the commission of the alleged crime before the Indictment was returned, and also challenging the delay of six months between the return of the Indictment and petitioners' Arraignment.

2. The United States District Court, Central District of California, denied petitioners' Motion to Dismiss, and

petitioners were convicted on all counts of the Indictment on July 6, 1972. Petitioners filed a timely Notice of Appeal.

3. On April 4, 1973, petitioners' conviction of Title 18, U.S.C., § 2314 was reversed but the convictions on all other counts were affirmed.

4. On May 17, 1973, petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals for the Ninth Circuit.

5. On June 4, 1973, the Court of Appeals for the Ninth Circuit granted petitioners' Application for Stay of Mandate pending filing of this Petition for Writ of Certiorari.

6. There have been no motions for extension of time within which to file this Petition for Writ of Certiorari.

7. The jurisdiction of this Court is invoked under Title 28, U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were denied their Fifth and Sixth Amendment rights when their trial commenced approximately four years after the commission of the alleged offenses. Specifically:

A. Whether petitioners were denied Due Process of Law as guaranteed by the Fifth Amendment of the United States Constitution, when they were not indicted until September of 1971 for offenses which occurred in late May and early June of 1968, in light of the facts:

(1) The government's principal witness, Lee Spencer Parker, was interviewed about the burglaries on September 9, 1969 and February 7, 1970.

(2) Lee Spencer Parker signed a statement

about the alleged burglaries implicating petitioners on May 24, 1971.

(3) On June 28, 1971, Ronald Hoel signed a statement implicating petitioners in the burglaries.

All evidence presented at trial was obtained by June of 1971, but the case was not presented to the Grand Jury until September of 1971, and the Indictment was not returned until September 22, 1971.

B. Whether the delay of approximately six months from the date of the Indictment, September 22, 1971, until the date of the Arraignment, March 27, 1972, denied petitioners their right to a Speedy Trial as guaranteed by the Sixth Amendment to the United States Constitution when the trial judge stated that the delay was inexcusable.

C. Whether the delay of approximately four years from the date of the alleged crimes in May and June of 1968, until petitioners were Arraigned on March 27, 1972, denied petitioners Due Process of Law as guaranteed by the Fifth Amendment to the United States Constitution.

These delays seriously prejudiced petitioners' defense at trial by hindering petitioners' ability to recall where they were, who they were with, and what they were doing at the time of the burglaries. Petitioners were also unable, because of the delay, to locate a material witness for the defense, Marjorie Rhodes, who was expected to testify that Lee Spencer Parker told her that he committed the burglaries with individuals other than the petitioners, and other witnesses, Wes and Phil, who were expected to testify that they committed the burglaries with Lee Spencer Parker but not with petitioners.

2. Whether petitioners were denied Due Process of Law when the United States District Court, Central District of California, allowed a written hearsay statement of the principal government witness, Lee Spencer Parker, made on May 24, 1971, into evidence over strenuous defense objection. Specifically, the statement unfairly and prejudicially emphasized the testimony of Lee Spencer Parker to the jury by:

A. Allowing a prior statement to be received for the truth of the matter asserted in the statement.

B. Unfairly emphasizing the statement and the testimony of Lee Spencer Parker by allowing the jury to examine his prior statement in the Jury Room.

3. Whether petitioners were denied Due Process of Law when the United States District Court, Central District of California, determined that the uncorroborated testimony of two accomplices was sufficient to allow the case against petitioners to go to the jury. Specifically, whether:

A. The testimony of Lee Spencer Parker, an admitted accomplice, co-conspirator, ex-felon, who received favorable treatment from the government for his testimony and who had bad feelings toward petitioners, and

B. The testimony of Ronald Hoel, an accomplice, co-conspirator, who was a personal friend of Lee Spencer Parker, who gave a statement to the authorities after talking to Mr. Parker, and who testified under a grant of immunity,

was sufficient to establish a prima facie case against petitioners.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant and constitutional statutory provisions are set forth in Appendix "C"; they are:

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF FACTS

Sometime between May 29 and May 30, 1968, the East Long Beach Station Post Office was burglarized and 1,876 blank money orders were taken. Sometime between June 15 and June 16, 1968, the Bellflower Post Office was burglarized and 292 money orders, money order control stamps, cash, stamps, and a money order machine were taken.

The principal government witness, Lee Spencer Parker, implicated petitioners in the burglaries of the above-mentioned post offices.[1] Parker allegedly discussed possible burglaries with Jack Galardi and pursuant to this discussion, Jack Galardi rented a truck around May 8, 1968, to use in a burglary.

According to Parker, on the first burglary attempt, he entered the East Long Beach Post Office with Jack and Angel Galardi acting as lookouts. This burglary was unsuccessful

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[1]It was established that Mr. Parker had bad feelings toward petitioners, because petitioners had informed a local bail bondsman that Mr. Parker had jumped bail. The testimony established that Mr. Parker was involved in the alleged burglaries and that he was testifying as an accomplice, co-conspirator, ex-felon, who had been given immunity from several separate burglaries and who had hopes of receiving favorable treatment by the federal authorities so that he could be paroled into the federal penal system from the Florida penal system where he was serving a 25-year sentence.

because the safe could not be removed from the Post Office.[2]

The second, and successful, attempt to burglarize the East Long Beach Post Office took place during the last of May, 1968. Parker entered the Post Office and opened the safe; the contents were placed inside a mail sack which was placed in the trunk of Angel Galardi's car and taken to the Galardis' office at the Rainbow Bar.[3]

In the East Long Beach Post Office burglary, Parker rented the truck and entered the Post Office along with Ronald Hoel; Angel Galardi acted as the lookout in the alley; and Jack Galardi acted as a lookout on the front street. The safes were removed from the Post Office and hauled to a warehouse owned by Jack Galardi. The following morning Parker and Jack Galardi opened the safes.[4]

Ronald Hoel gave a statement to Postal Inspector Nelson in June, 1971, *after* he was allowed to talk to Parker for about one hour and *after* he had been promised immunity from prosecution for the burglary. When he spoke to Parker in jail he was informed that if he (Hoel) said that the Galardis acted as lookouts in the burglaries, he would

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[2]On cross-examination, it was established for the first time that individuals other than Parker and petitioners were involved in this burglary. Individuals by the name of "Wes" and "Phil" were mentioned by Parker as being accomplices.

[3]There was again contradiction of Parker's testimony on cross-examination where Parker admitted that a "Phil" was inside the Post Office with him. On direct examination, and in his statement to Inspector Nelson, Parker did not mention that "Phil" was involved in this burglary.

[4]Parker testified that the truck with the safes in it was escorted from the Post Office between Jack Galardi's Cadillac and Angel Galardi's Thunderbird, but Ronald Hoel testified that both Galardis were in one car.

Parker testified that Jack Galardi was the mastermind of the burglaries even though he (Parker) owned all the burglary tools and had burglarized Post Offices prior to these incidents with persons other than petitioners. In contrast, Ronald Hoel testified that Parker was the boss of the burglary.

receive immunity from the government. At trial, Ronald Hoel testified that he participated in the burglary of the Bellflower Post Office along with Parker and petitioners.

Inspector Nelson testified that he interviewed Jack Galardi on December 21, 1970, in the office above the Rainbow Bar; during this interview, Jack Galardi denied having certain Money Orders in his possession; however, Nelson did not tell Jack Galardi that he was suspected of having the Money Orders in his possession two years previously; further, Mr. Jack Galardi was not given an opportunity to explain how his fingerprints got on the Money Orders.[5] Inspector Nelson also interviewed Jack Galardi on April 1, 1971; Inspector Nelson showed him a picture of Parker, and Jack Galardi said that the picture looked familiar.

Jack Costian testified as a handwriting and fingerprint expert that petitioners' fingerprints were found on several of the stolen Money Orders; to find these fingerprints, he had examined over 2,200 exhibits. While Mr. Costian could testify that the fingerprints were on the Money Orders, he could not testify when the prints were placed on the Orders or in what country the Money Orders were when the prints were placed upon them.

John Takash, manager of the Money Order Branch, United States Postal Service in Washington, D. C., testified that there was no way that he could tell how many hands the Money Orders had been through before they were cashed and that it was impossible for him to know whether

[5]At trial Jack Galardi testified that he handled numerous monetary instruments in his bar business because all such instruments had to be personally approved by him before they could be cashed.

the Money Orders were presented to businessmen in the Los Angeles area to be cashed before they were shipped overseas.

Angel Galardi testified that he knew Parker as "Bald Headed Bill" and met him while tending bar at the Rainbow[6]; Parker had a violent temper; Parker had been in the bar with a pistol in his pocket; Parker was involved in altercations in the bar; Parker had been told not to return to the bar again without the express permission of petitioners; and while in the bar, Parker had bragged that he was a professional thief. Angel Galardi further testified that he was not involved in the burglaries, or the disposition of the stolen Money Orders.

Jack Galardi testified that he knew Parker as "Bald Headed Bill"; that he (Jack Galardi) handled many monetary documents at his bar because his business custom was to clear monetary documents before they could be cashed; that he had numerous occasions to rent trucks in running his business; and that he wasn't involved in the burglaries or the disposition of the stolen Money Orders.[7]

A defense witness, Patrick Reilly, testified that Parker and Hoel sold him $1,000 worth of American Express Travelers Checks in mid-1968; that he was offered $10,000 of American Express Travelers Checks after this; and that Hoel and Parker later offered him $100,000 worth of Money Orders. In 1968, Reilly did not know petitioners.

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[6]While in Long Beach, Parker used the name Bill Grooms; he had been in the Rainbow Bar on numerous occasions; and he was not employed in May or June of 1968.

[7]In contrast to Inspector Nelson's testimony, Jack Galardi testified that he told Nelson that an Indictment would hurt his chances to get a gaming license in Las Vegas; that he hadn't made a penny out of his investments, not that he hadn't made a penny in burglaries; and that when he told Nelson he could tell him more but not under these circumstances, he was talking about his brother Roger who had been arrested.

PROCEDURAL BACKGROUND

Respondent failed to give any meaningful reason why petitioners' Indictment was delayed until September 22, 1971, and the Arraignment was delayed until March 27, 1972.[8]

After petitioners' convictions they filed a timely Notice of Appeal. The Ninth Circuit reversed petitioners' convictions for transportation of stolen money orders in foreign commerce, but affirmed on all other counts. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied, so petitioners' only remedy to correct the erroneous determinations in the United States District Court, Central District of California, and the Court of Appeals for the Ninth Circuit, is to petition for a Writ of Certiorari to this Court.

REASONS FOR GRANTING THE WRIT

Petitioners request that this Court review the decision of the United States Court of Appeals for the Ninth Circuit in affirming the judgment of the United States District Court, Central District of California, that petitioners were denied their rights to Due Process of Law and to a Speedy Trial. Specifically, petitioners contend that the Circuit Courts need guidance in establishing standards as to what constitutes "actual prejudice" as the tests are established in *Barker v. Wingo*, 407 U.S.

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[8] In its answering brief in the United States Court of Appeals for the Ninth Circuit, respondent alleged that it did not have Mr. Parker's signed statement until May of 1971. However, no reason is given why this statement could not have been obtained earlier.

The United States District Court, Central District of California, found that there was absolutely no reason for the delay between the Indictment on September 22, 1971, and the Arraignment on March 27, 1972.

514, 92 S. Ct. 2182 (1972); *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455 (1971).

This Court should take the opportunity to clear up the misunderstanding and subsequent erroneous application of the so-called "uncorroborated accomplice rule" which has been interpreted by lower courts to allow a conviction to stand on the uncorroborated testimony of an accomplice. Petitioners contend that this rule denies accused persons Due Process of Law as guaranteed by the Fifth Amendment, in that inherently untrustworthy testimony is deemed sufficient to sustain a conviction.

Petitioners further request that this Court review *Kaneshiro v. United States*, 445 F.2d 1266 (9th Cir. 1971), *cert. denied* 404 U.S. 992, which allows written hearsay statements to be introduced into evidence–a doctrine followed only by the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I

Petitioners Were Denied Their Rights To A Speedy Trial And Due Process Of Law When The Government Inexcusably Delayed Four Years From The Commission Of The Alleged Offense Until The Time Of Trial.

A.

Petitioners were denied their right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution when the government inexcusably

delayed three and one-half years from the date of the commission of the alleged crime until the indictment was returned, said delay prejudicing petitioners, allowing material defense witnesses to disappear and dimming petitioners' memories as to their whereabouts on the days of the alleged burglaries.[9]

The alleged burglaries occurred around the end of May, 1968, and around the middle of June, 1968. The stolen Money Orders were recovered in the Money Order Branch of the United States Postal Service in August of 1968. The government interviewed Lee Spencer Parker about his involvement in the burglaries and obtained interview notes on December 9, 1969 and February 9, 1970. On May 24, 1971, Parker signed a statement implicating petitioners in the burglaries. On June 28, 1971, the government obtained a statement from Ronald Hoel implicating petitioners. Nevertheless, the case was not presented to a Grand Jury until September 22, 1971, and petitioners were not Arraigned until March 27, 1972, in the Central District of California.

Nowhere does the government explain its delay in completing the investigation after interviewing Mr. Parker in late 1969 and early 1970 and obtaining all the Money Orders with the accompanying fingerprints in August of 1968. The only possible reason for the delay, other than actual malice on the part of the government, was negligence. Said negligence does not excuse prejudicial delay. *Barker v. Wingo, supra.*

Petitioners amply demonstrated prejudice suffered by

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[9]Petitioners further request that this Court vest the entire delay between the commission of the offenses and petitioners' Arraignment as being violative of Due Process of Law.

them during this unconscionable delay at the Motion for Dismissal for Lack of Speedy Prosecution and through trial testimony. It was discovered during the course of the trial that a "Wes" and a "Phil" were involved in the burglaries with Lee Spencer Parker and Ronald Hoel. The defense theory throughout the case was that Ronald Hoel and Lee Parker participated in the burglaries with Wes and Phil, but not with petitioners. At the time that Wes and Phil's involvement was disclosed[10], they were not available to be called as defense witnesses to testify that petitioners were not involved in the burglary. The defense was also unsuccessful in locating Marjorie Rhodes, a defense witness who was expected to testify that she lived with Mr. Parker during the time of the alleged burglaries and that he admitted committing the burglaries with individuals other than petitioners. The inability to locate these witnesses was solely attributable to this delay.

This Court has recognized that delay prior to Indictment raises serious Due Process of Law problems when prejudice to the accused is established. *United States v. Marion, supra.* The anticipated testimony of Wes, Phil and Miss Rhodes was given to the Court and offer of proof and by affidavit. When considering this proof of prejudice to petitioners, this Court should be aware of comments of Justice Brennan in his concurring opinion in *Dickey v. Florida,* 398 U.S. 30, 90 S. Ct. 1564 (1970):

> "The concrete evidence is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable,

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[10]Wes and Phil's involvement was not discovered by petitioners until this was brought out on cross-examination during the actual trial.

> proving their materiality is more difficult . . . And it borders on the impossible to measure the cost of delay in terms of the dim memories of the parties and available witnesses. As was stated in *Ross v. United States*, 121 U.S. App. D.C. 233, 238, 349 F.2d 210, 215 (1965): 'The Defendant's failure of memory and his inability to reconstruct what he did not remember virtually precludes his showing in what respect his defense might have been more successful if the delay had been shorter . . . . In a very real sense, the extent to which he was prejudiced by the government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice.' "

See *Jones v. Superior Court*, 3 Cal. 3d 734, 91 Cal. Rptr. 578 (1970).

Of course, the remedy for a denial of due process in this situation is the same remedy as a denial of the right to a speedy trial, dismissal. *Strunk v. United States*, ... U.S. ....., ... S. Ct. ....., 41 Law Week 4795 (1973).

B.

Petitioners were denied their right to a Speedy Trial as guaranteed by the Sixth Amendment to the United States Constitution when the government inexcusably delayed six months after petitioners were Indicted until they were Arraigned in the United States District Court, Central District of California.

After the government unconscionably delayed for three

and one-half years before indicting petitioners on the instant charges, it delayed six months between petitioners' Indictment on September 22, 1971 and petitioners' Arraignment on March 27, 1972. All of this delay is attributable to the government, and the government had no explanation for the delay other than that there was a mix-up in communications and paperwork between the United States Attorney's Office in Las Vegas and the office in Los Angeles. The Honorable Irving Hill, Judge Presiding, called this record one of the worst records that he had ever seen and stated that there was *no excuse at all for the delay*. Of course, the government is responsible for the delay whether it was negligent or intentional when the right to a Speedy Trial is involved. *Barker v. Wingo, supra.* In *Strunk v. United States, supra,* the government attempted to justify a delay on the grounds that there was a mix-up on Rule 20 proceedings. The United States Court of Appeals for the Seventh Circuit rejected this argument and placed the burden upon the government for the delay.

While the delay in the instant case between Indictment and Arraignment is six months, it is submitted that this is sufficient time to prejudice petitioners when the three and one-half year delay, which denied petitioners the right to Due Process of Law, is considered with the six-month delay. As was noted in *Stewart v. Craven,* 456 F.2d 913 (9th Cir. 1972):

> "It is true, as the appellees contend, that the length of delay in this case (13 months, three of which were caused by Stewart's interim collateral actions) is not per se sufficient to find a denial

> of Sixth Amendment rights [citations omitted]. As we noted in *Mancusi, supra,* 'dismissal has rarely been granted for a delay of less than several years.' 412 F.2d at 90. We think, however, that when delay *actually prejudices the defendant, or cannot be justified by a reference to a legitimate concern for the rights of public justice, dismissal is appropriate even though the delay is of much shorter duration.*" (Emphasis added.)
>
> 456 F.2d at 915.

II

Petitioners Were Denied Their Right To Due Process Of Law As Guaranteed By The Fifth Amendment When The United States District Court, Central District Of California, Allowed A Prior Written Hearsay Statement Of Lee Spencer Parker, Implicating Petitioners, Into Evidence.

The principal case relied upon by the United States Court of Appeals for the Ninth Circuit; the United States District Court, Central District of California; and the government to justify receiving the prior written hearsay statements of Mr. Parker into evidence is *Kaneshiro v. United States, supra,* 445 F.2d 1266 (9th Cir. 1971), *cert. denied* 404 U.S. 992, where prior statements were allowed into evidence after improper and unfair cross-examination had occurred. In the instant matter, only one question was allegedly improperly asked by counsel for appellant Lafkas, and it is highly questionable whether this question was in fact improper.[11] It is

[11] During cross-examination counsel for Lafkas referred to the prior statement

submitted that one question is not extensive unfair cross-examination and that the statement should definitely have not been introduced into evidence. In any event, any misunderstanding created by this question was cleared up when the government prosecutor elicited from Inspector Nelson the fact that Money Orders referred to by counsel for Lafkas were Money Orders from other burglaries, not the burglaries in the matter at hand. Counsel has been unable to find any case in any of the other Circuit Courts which allows these prior written hearsay statements to be introduced into evidence. In fact, in *United States v. Clardy*, 472 F.2d 578 (9th Cir. 1973), the United States Court of Appeals for the Ninth Circuit indicates that out-of-court statements made by an appellant's alleged accomplice are not substantive evidence of appellant's guilt.

This Honorable Court has ruled prior statements of a witness may not be introduced into evidence against other participants in a crime. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). There, a statement of Wong Sun was introduced into evidence against a co-defendant, Toy, in the trial court. In apparent contradiction to the result reached in *Kaneshiro, supra*, the Court held:

> "Without scrtinizing the contents of Toy's ambiguous recitals, we conclude that no reference to

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11 (cont'd)
of Mr. Parker and asked him whether certain Money Orders had in fact been turned over to the prosecution. The statement by Mr. Parker indicated that the proceeds of another burglary were in a container where Mr. Parker could obtain them. These proceeds were not involved in the burglaries for which petitioners were on trial. However, it is submitted that this was a relevant area of cross-examination as the answer to the question would indicate whether Parker was truthful in his statement. If the Money Orders had been recovered, it would indicate that the statement was truthful, while, if they had not, it would cast a doubt upon Mr. Parker's credibility. Of course, this was relevant to the weight that the jury should give Mr. Parker's testimony at trial.

> Toy in Wong Sun's statement constitutes admissible evidence corroborating any admission by Toy. We arrive at this conclusion upon two clear lines of decisions which converge to require it. One line of our decisions establishes that criminal confessions and admissions of guilt require extrinsic corroboration; *the other line of precedence holds that an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime.*" (Emphasis added.)
>
> 83 S. Ct. at 818.

The Court goes on to say:

> "We have never ruled squarely on the question presented here, whether a co-defendant's statement might serve to corroborate even where it will not suffice to convict.[17] We see no warrant for a different result so long as the rule which regulates the use of out-of-court statements *is of admissibility, rather than simply of weight,* of the evidence. The import of our previous holdings is that a co-conspirator's hearsay statements may be admitted against the accused *for no purpose whatever,* unless made during and in furtherance of the conspiracy." (Footnote omitted.) (Emphasis added.)
>
> 83 S. Ct. at 419.[12]

See *United States v. Lewis,* 406 F.2d 486 (7th Cir. 1969, *cert. denied* 394 U.S. 1013; *Gregory v. United States,* 369 F.2d 185, 191 (C.A. D.C. 1966), *cert. denied* 396 U.S. 865;

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[12]The statements by Mr. Parker were, of course, statements made after any conspiracy had ended. The written statement was taken in 1971 and the burglaries had occurred in 1968.

United States v. Leggett, 312 F. Supp. 566, 572 (4th Cir. 1972); *United States v. Toner,* 173 F.2d 140 (3rd Cir. 1949).

III

The United States District Court, Central District Of California, Erroneously Determined That The Uncorroborated Testimony Of Two Admitted Accomplices, Co-Conspirators, Testifying Under Grants Of Immunity, Was Sufficient To Allow The Case Against Petitioners To Survive A Judgment For Acquittal.

The principal government witnesses were Lee Spencer Parker and Ronald Hoel. Both of these witnesses testified under grants of immunity; Mr. Parker was granted immunity for other burglaries he admitted; and Mr. Hoel was granted immunity for the instant burglaries. Parker admitted that he was biased against petitioners; that he had bad feelings toward petitioners because petitioners had reported him to a bail bondsman as a bail jumper; and that he had been ordered out of petitioners' bar in Long Beach, California. Mr. Hoel was informed by Parker that if he (Hoel) said that petitioners were involved in the burglaries, he (Hoel) would receive immunity from the government. In these circumstances it is inconceivable that the jury could view the testimony of these witnesses as credible and substantial. *Moody v. United States,* 376 F.2d 525, 528 (9th Cir. 1967); *Quiles v. United States,* 344 F.2d 490, 494 (9th Cir. 1965), *cert. denied* 382 U.S. 992.

It has been held that accomplice testimony can be so unbelievable that it will not, by itself, sustain a conviction.

Lyda v. United States, 321 F.2d 788 (9th Cir. 1963); *United States v. Haderlein*, 118 F. Supp. 364 (N.D. Ill. 1953).

Recently, the United States Court of Appeals for the Ninth Circuit has indicated that the so-called "uncorroborated accomplice rule" is an incorrect rule resulting from an erroneous reading of early Supreme Court cases. *United States v. Hibler*, 463 F.2d 455 (9th Cir. 1972), Judge Anderson concurring 463 F.2d 462-464. Judge Anderson carefully examines this so-called rule and reaches the conclusion that a conviction sustained solely upon the uncorroborated testimony of an accomplice must be reversed.[13] For this reason, this Court should grant certiorari to determine this important federal question.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this Petition for Writ of Certiorari should be granted and that the issues herein presented be given plenary consideration by this Honorable Court.

Respectfully submitted,

MICHAEL D. NASATIR of
NASATIR, SHERMAN & HIRSCH

Counsel for Petitioners

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[13]Of course, this is the rule in California and many other states.

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APPENDIX "A"

ORDER ENTERED APRIL 4, 1973

In the United States Court of Appeals, Ninth Circuit.

NO. 72-2817

UNITED STATES OF AMERICA, Appellee, vs. JACK EDWARD GALARDI, Appellant.

NO. 72-2743

UNITED STATES OF AMERICA, Appellee, vs. ANGEL JERROLD GALARDI, Appellant.

NO. 72-277

UNITED STATES OF AMERICA, Appellee, vs. PETER MICHAEL LAFKAS, Appellant.

Appeal from the United States District Court
Central District of California.

Before: BROWNING, KILKENNY and TRASK, Circuit Judges.

KILKENNY, Circuit Judge:

Appellants appeal from certain judgments of conviction and sentences. Count One charges the Galardis with conspiracies in violation of 18 U.S.C. § 371; Counts Two and Four charge the Galardis with violations of 18 U.S.C. § 2115 and 18 U.S.C. § 2 in aiding and abetting another in forcibly breaking into a Post Office building; Counts Three and Five charge the Galardis with a violation of 18 U.S.C. § 641 in receiving stolen United States Postal Money Orders; Count Six charges

the Galardis and appellant Lafkas with a violation of 18 U.S.C. § 371 in conspiring to commit an offense against the United States by transporting in foreign commerce certain United States Postal Money Orders of a value exceeding $5,000.00, which money orders had been stolen; Count Seven charges appellant Lafkas with a violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2 in aiding and abetting appellant, Jack Edward Galardi, in transporting in foreign commerce postal money orders of a value exceeding $5,000.00. Additionally, Lee Spencer Parker was named as a co-defendant in Counts One through Six. Prior to trial, he entered a plea of guilty to Counts One, Two and Four and then appeared as a principal witness for the government. Angel Jerrold Galardi was sentenced to imprisonment for a term of five years on each of the Counts One through Six with the sentences to run concurrently, a total period of incarceration of five years. Jack Edward Galardi was sentenced to imprisonment for a term of five years on each of the Counts One through Seven with the sentences to run concurrently, a total period of incarceration of five years. Peter Michael Lafkas was sentenced to imprisonment for a term of four years on each of Counts Six and Seven with the sentences to run concurrently, a total period of incarceration of four years.

The Galardi Appeals

Inasmuch as the Galardi appeals present essentially the same contentions, we shall treat them together.

The evidence, viewed in a light most favorable to appellee, *Glasser v. United States,* 315 U.S. 60, 80 (1942), *Vitello v. United States,* 425 F.2d 416, 421 (CA9 1970),

cert. denied 400 U.S. 822 (1970), convincingly establishes that the Galardis actively participated in the robbery of two United States Post Offices in California during the summer of 1968. Stolen in the robberies were blank United States Postal Money Orders with a potential value of in excess of $200,000.00. The Galardis hid the money orders on the premises of a bar and warehouse which they owned in Long Beach. Subsequently, they entered into an agreement with appellant Lafkas to transport the money orders to Viet Nam where Lafkas would cash them on the black money market. Following through on this arrangement, over 1,600 of the stolen money orders were cashed in the Far East for more than $160,000.00. The money orders were recovered and received in evidence during the course of the trial. On a substantial number of the orders were the fingerprints of the appellants.

Contentions

(1) In claiming unreasonable pre-indictment delay, appellants point to the fact that the crime was committed in the summer of 1968 and that they were not indicted until September, 1971. The appellee responds by saying that much of the government's evidence was not secured until a few months prior to the indictment. It wasn't until May 24, 1971, that the co-conspirator Parker signed a sworn statement with reference to appellants' participation in the crime. As we read the record, the appellants have not brought themselves within the exceptions stated in *United States v. Marion*, 404 U.S. 307, 320-323 (1971), by showing that they were in any way prejudiced by the delay. The mere dimming

of a memory is not sufficient. *United States v. Griffin,* 464 F.2d 1352, 1354 (CA9 1972). The assertion that a missing witness might have been useful does not show the "actual prejudice" required by *Marion.*

(2) Appellants' argument on post-indictment delay is also without merit. The record makes it clear that much of the delay was occasioned by a belief on the part of the United States Attorney that appellants wished to follow the procedure outlined in Rule 20, FRCrimP. The appellants, upon arrest, were immediately admitted to bail. The trial judge found that appellants had shown no prejudice by the delay and that the claim of dimmed memory was conclusory and insufficient. His finding and conclusion are well supported by the record and by the authorities. *Barker v. Wingo,* 407 U.S. 514 (1972); *United States v. Lewis,* 406 F.2d 486 (CA7 1969), *cert. denied* 394 U.S. 1013.

(3) Co-defendant Parker appeared as a witness for the government. During the course of his examination, the defense made reference to an alleged inconsistency between his testimony and his prior written statements. Later, the statements were admitted in evidence over appellants' objections. The judge ruled that appellants had emphasized an inconsistency between the statements and the testimony in the record. The record supports this view. In these circumstances, the statements were properly admitted. *Kaneshiro v. United States,* 455 F.2d 1266 (CA9 1971), *cert. denied* 404 U.S. 992.

(4) Next, appellants attempt to utilize *Lenske v. United States,* 383 F.2d 20 (CA9 1967), in their argument that the testimony before the grand jury should have been recorded. The author of *Lenske* criticized the government

for recording and using only a part of the grand jury testimony. Tersely stated, *Lenske* has no application. Appellants do not argue that the facts of this case present "a clear indication of prejudice." *United States v. Thoresen*, 428 F.2d 654, 666 (CA9 1970).

(5) Appellants would have us abandon our time honored rule that the uncorroborated testimony of an accomplice is sufficient to convict. Such an action would require *in banc* consideration. Aside from that fact, the evidence of Parker, the accomplice, is amply corroborated by other evidence, for example, the fingerprints on the Orders. In any event, we are not inclined to depart from the rule stated in *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *United States v. Hibler*, 463 F.2d 455, 458 (CA9 1972), and authorities therein cited. There is nothing in this record which would indicate a possible miscarriage of justice, such as mentioned in *Hibler*, p. 459.

(6) Although the trial judge castigated counsel for Angel Galardi for continually ignoring the court's order with reference to responding to objections, and the judge at one point indicated that he might be compelled to employ a contempt proceeding, our examination of the record convinces us that the court's remarks were justified. Moreover, the record convincingly demonstrates that counsel was in no way intimidated by these remarks.

The Lafkas Appeal

The Lafkas challenge to the convictions under Counts Six[1]

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[1]Also, inferentially challenged by the Galardis.

and Seven calls for the construction of 18 U.S.C. § 2314, as applied to the record before us. In this argument, he concedes that the money orders were stolen and were transported in foreign commerce in violation of the first paragraph of § 2314,[2] and that the proof demonstrates that the money orders were altered before they were transported in foreign commerce and, consequently, fell within the exclusion of the section.[3] The challenge involves the basic facts and a study of the history of the legislation.

The basic facts are simple. The money orders were "in blank" when stolen. The Galardis, with stolen equipment, filled in the value on each bond at $100.00. The money orders were forged and altered before they left the United States and placed in foreign commerce. United States Money Orders are "obligations" or "other securities" of the United States within the meaning of 18 U.S.C. § 2311, defining securities. See *Nelson v. United States*, 406 F.2d 1136, 1138 (CA10 1969); *United States v. Powers*, 437 F.2d 1160, 1161 (CA9 1971) [American Express Money Orders]. Clearly, the stolen money orders were forged and altered securities of the United States within the meaning of the exclusion to the statute unless, as argued by the government, the exclusion has no application to the paragraph making it a crime to transport stolen securities in foreign commerce.

The legislation in question is a splendid example of what happens to statutes when an exclusion or exception is taken

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2. "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . "

3. "This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of any obligation or other security of the United States, . . . "

out of context and placed with its initial subject and other existing laws in an overall revision or codification. On June 25, 1948, the Congress of the United States passed an Act to " . . . revise, codify and enact into positive law, Title 18 of the United States Code, entitled 'Crimes and Criminal Procedure' ". In this revision and codification, the Congress passed the present Section 2314, which is a combination of previously distinct offenses patterned into one section. See 62 Stat. 683, 806, 807.

A casual look into the statute's history reveals that the parent[4] of the paragraph of the statute under which Lafkas was indicted *and the exclusion* were part and parcel of the *same section.* The applicable section [53 Stat. 1178, Act of August 3, 1939] reads as follows:

"AN ACT

To amend the National Stolen Property Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the National Stolen Property Act, approved May 22, 1934 (48 Stat. 794; U.S.C., title 18, sec. 415), be, and the same is hereby, amended to read as follows:

'SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously convert-

[4]The previous statute did not have the exclusion. 48 Stat. 794.

ed, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: *Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an 'obligation or other security of the United States' as defined in section 147 of the Criminal Code (U.S.C., title 18, sec. 261) or (2) an obligation, bond,* certificate, security, treasury note, bill, promise to pay, or bank note, issued by any 'foreign government' as defined in the Act of June 15, 1917, title VIII, section 4 (U.S.C., title 18, sec. 288), or by a bank or corporation of any foreign country." [Emphasis supplied.]

18 U.S.C. § 261 defining "obligation or other security of the United States" mentioned in the initial legislation is now 18 U.S.C. § 8.[5]

[5] 18 U.S.C. § 8.
"§ 8. Obligation or other security of the United States defined

To be noted is the fact that the language of the present exclusion " . . an obligation or other security of the United States . . . . " is precisely the same as the language of the initial exclusion, the enactment of August 3, 1939.

The legislative background[6] leading up to the passage of the 1939 amendment makes it apparent that the Congress intended to exclude falsely made, forged, altered or counterfeited securities of the United States from what is now, with slight modification, the first paragraph of § 2314. From that report and the amendment itself, it is manifest that the Congress intended to include for the first time " . . . transportation of falsely made, forged, altered or counterfeited securities . . . ", and at the same time determined that this inclusion should not apply to United States obligations for the reason that existing statutes adequately dealt with trafficking in such securities. The Attorney General of the United States, in a letter to William B. Bankhead, Speaker of the House of Representatives, from which we quote in relevant part, expressed the same viewpoint:

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5 (cont'd)
The term 'obligation or other security of the United States' includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps."

[6]We quote from the report of the Committee on the Judiciary of the House.
"Section 1
Section 3 of the Stolen Property Act makes it a Federal criminal offense knowingly to transport in interstate or foreign commerce stolen property, securities, or money of the value of $5,000 or more. This section of the law is amended by section 1 of the reported bill to include such transportation of property, securities, or money of the same minimum value which have been feloniously converted, *and also to include transportation of falsely made, forged, altered, or counterfeited securities of the apparent or purported value of $5,000 or more. Counterfeited securities of the United States and foreign governments are exempted by a proviso because they are dealt with adequately by other provisions of existing law.*" [Emphasis supplied.] [H.R. Rep. No. 422, 76th Cong., 1st Sess. (1939)].

> "It is also desirable to include the transportation of counterfeit securities within the prohibitions of the statute. *It need not, however, embrace counterfeit Government obligations or counterfeit foreign obligations, as the statutes relating to counterfeiting penalize their possession.*" H.R. Rep. No. 422, 76th Cong., 1st Sess. (1939). [Emphasis supplied.]

The Attorney General directed a letter, using the same language, to Henry F. Asher, the Chairman of the Senate Judiciary Committee, containing the same language as used in the communication to Speaker Bankhead.

Under the provisions of 18 U.S.C. § 471,[7] anyone who, with intent to defraud, falsely makes, forges, counterfeits or alters any obligation or other security of the United States is guilty of a crime. This law was passed on March 4, 1909, 35 Stat. 1115, long prior to the 1939 legislation and, no doubt, was one of the laws to which the legislative history makes reference. 18 U.S.C. § 500 making it a crime for any one to falsely alter in any material respect any money order is another statute under which appellants could have been indicted. In other words, one who forges or alters an obligation or other security of the United States, or falsely alters a money order, is guilty of a crime without the necessity of crossing a state line. To invoke the Commerce Clause of the Constitution in order to provide federal jurisdiction, in these circumstances, would be an exercise in futility.

Worthy of more than just casual notice is the fact that

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[7] 18 U.S.C. § 471.

"§ 471. Obligations or securities of the United States.

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

the use of the language "*this section*" in the exclusion was carried through in the codification and revision in 1948. Clearly, the exclusion was intended to apply to each paragraph, including the first. Aside from the clarity with which the congressional history exposes the congressional intent, we find no vagueness or ambiguity in the statute itself. The appellee argues that the exclusion is inapplicable to the present case for the reason that the appellant was indicted for transporting stolen money orders, not falsely made United States Postal Money Orders. The answer to the argument is that the language of the exclusion " . . . *this section* . . . " is all inclusive and applies to the paragraph under which the indictment was returned with the same degree of exclusion as it does to others.

Even if we could say that there was some doubt as to the meaning of the exclusion, the government would still be in trouble. It is well settled that any ambiguity or vagueness in a criminal statute must be resolved in favor of lenity. *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Campos-Serrano*, 404 U.S. 293 (1971); *United States v. Bass*, 404 U.S. 336 (1971). As recently as February 22, 1973, the Supreme Court in *United States v. Emmons*, ... U.S. ....., has reaffirmed the rule stating: " . . . this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. . . . "

Finally, the government argues that even though the exclusion might prevent appellants' prosecution under Count Seven, charging a violation of § 2314, nevertheless, Count Six, the conspiracy count, must stand.

The government's argument falls of its own weight. It should require no citation of authority to say that a person

cannot conspire to commit a crime against the United States when the facts reveal there could be no violation of the statute under which the conspiracy is charged. If, as we have just held, the exclusion prevents prosecution under § 2314, then the appellants cannot be guilty of conspiring to commit that offense against the United States. They are charged only with conspiring to violate 18 U.S.C. § 2314. That section does not apply to falsely made and altered obligations of the United States. Although the case is factually distinguishable, the language of Justice Stewart in *Ingram v. United States*, 360 U.S. 672, 680 (1958), " . . . Smith and Low were not liable for the wagering tax. . . . They could not, therefore, have been convicted of the crime which they were charged with *having conspired to commit.** To sustain their conviction on this record would be to make of the crime of conspiracy just that 'dragnet to draw in all substantive crimes' which the Court warned against in . . . . ", is very much in point and persuades us to the conclusion just reached. *United States v. Smith*, 200 F. Supp. 227 (E.D. Tenn. 1961), construing 18 U.S.C. § 2314 on a conspiracy charge in connection with falsely made obligations of a foreign corporation [Canada] is also in point. Obviously, the conspiracy charge cannot stand.

Other Contentions

Appellants other contentions with reference to: (1) prosecutorial misconduct, (2) Parker's motives for testifying, (3) alleged hearsay within hearsay, (4) alleged declarations

*Emphasis supplied.

after the conspiracy had ended, (5) rulings on cross-examination of Parker, and (6) instructions as to money order valuation, are either patently groundless or the errors, if any, clearly harmless under Rule 52 (a), FRCrimP.

Conclusion

The judgments and sentences against Jack Edward Galardi and Angel Jerrold Galardi under Counts One, Two, Three, Four and Five are affirmed. The judgments and sentences of Angel Jerrold Galardi, Jack Edward Galardi and Peter Michael Lafkas under Count Six are reversed. The judgments and sentences of Jack Edward Galardi and Peter Michael Lafkas under Count Seven are reversed.

IT IS SO ORDERED.

Letter Accompanying Above

From the office of the Clerk, United States Court of Appeals for the Ninth Circuit, U. S. Court of Appeals and Post Office Building, 7th and Mission Streets, P. O. Box 547, San Francisco, California 94101.

RE: No's 72-2817 USA v. JACK EDWARD GALARDI
72-2743 USA v. ANGEL JERROLD GALARDI
72-2777 USA v. PETER MICHAEL LAFKAS

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judg-

ment was entered 4-4-73

72-2743 & 72-2817 - Affirmed in part and reversed in part

72-2777 - reversed.

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the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews

Clerk of Court

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

In the United States Court of Appeals, Ninth Circuit.

NO. 72-2817

UNITED STATES OF AMERICA, Appellee, vs. JACK EDWARD GALARDI, Appellant.

NO. 72-2743

UNITED STATES OF AMERICA, Appellee, vs. ANGEL JERROLD GALARDI, Appellant.

[Filed May 17, 1973]

Appeal from the United States District Court
Central District of California

Before: BROWNING, KILKENNY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing of appellants' Galardi and to reject their suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JUNE 24, 1973, I served the within PETITION FOR WRIT OF CERTIORARI (United States v. Galardi) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 (3 copies)

UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR - U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUNE 24th 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean Standefer, 326½ Main Street, Huntington Beach, Ca.
(714) 536-7161